No. 01-[illegible]

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In The

Supreme Court of the United States

ABU-ALI ABDUR RAHMAN,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF OF RESPONDENT

[illegible]

MICHAEL E. MOORE
Solicitor General

Joseph F. Whalen
Assistant Attorney General
Counsel of Record
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 532-7387

Counsel for Respondent

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CAPITAL CASE

QUESTIONS PRESENTED

I.

Whether the Sixth Circuit erred in holding that petitioner's Rule 60(b) motion was a prohibited "second or successive" habeas petition.

II.

Whether the Sixth Circuit abused its discretion in refusing to withhold its mandate (or remand to the district court) after the denial of certiorari by this Court to enable petitioner to challenge the district court's procedural default rulings that he did not appeal in the first instance.

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STATEMENT OF THE CASE

In 1987, petitioner, then known as James Lee Jones, was convicted of first degree murder, assault with intent to commit first degree murder, and armed robbery. The jury sentenced petitioner to death for the murder, finding three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the defendant was engaged in committing, or was attempting to commit, any first degree murder or robbery.[1] The Tennessee Supreme Court affirmed, *State v. Jones*, 789 S.W.2d 545 (1990), and this Court denied certiorari. *Jones v. Tennessee*, 498 U.S. 908 (1990).

In 1991, petitioner filed a petition for state post-conviction relief. The trial court denied the petition after an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed in all respects. *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn.Crim. App. Feb. 23, 1995). Petitioner then filed an application for further appellate review with the Tennessee Supreme Court under Tenn.R.App.P. 11. However, that application did not present all the claims that petitioner had previously presented to the intermediate appellate court. (J.A. 54-9) The Tennessee Supreme Court denied review, *Jones*

[1] The trial court sentenced petitioner to two consecutive life terms for the two remaining convictions.

v. State, 1995 WL 75427, and this Court denied certiorari. *Jones v. Tennessee*, 516 U.S. 1122 (1996).

Petitioner filed in the district court a petition for federal habeas corpus relief on April 23, 1996 (R. 1), and an amended petition on December 2, 1996 (R. 42), challenging his convictions and sentences. The district court issued an order granting the writ and vacating petitioner's death sentence on petitioner's claim of ineffective assistance of counsel at the sentencing phase. (J.A. 45, 46) The district court denied relief on all other claims. Several of these claims, including the claims at issue in this case, were determined to be procedurally defaulted due to petitioner's failure to exhaust by presenting them to the State's highest court, as well as his inability to establish cause and prejudice for the default or a fundamental miscarriage of justice. (J.A. 53-60, 62, 68) Both petitioner and the State appealed from the final judgment. However, petitioner did not appeal any of the district court's procedural default rulings. (J.A. 37, 130, 155)

The court of appeals reversed the judgment granting the writ as to petitioner's death sentence, but affirmed the judgment in all other respects. (J.A. 134) Rehearing was denied, (J.A. 20), but the court of appeals stayed the mandate pending a petition for writ of certiorari. (J.A. 21)

On October 9, 2001, this Court denied the petition for writ of certiorari. *Abdur'Rahman v. Bell*, 122 S.Ct. 386 (2001). The next day, petitioner filed in the Sixth Circuit a "Motion to Withhold the Mandate and Grant Rehearing En Banc or Remand for Further Proceedings," (J.A. 22, 152), in which he sought, *inter alia*, reconsideration of several prosecutorial misconduct claims previously denied as procedurally defaulted. (J.A. 154-56) The motion relied

on Tenn.Sup.Ct.R. 39, promulgated by the Tennessee Supreme Court on June 28, 2001, which provided that, from and after July 1, 1967, a litigant "shall not be required" to present a claim of error to the Tennessee Supreme Court in order to exhaust state remedies for federal habeas corpus purposes. (J.A. 278-79)

On November 2, 2001, petitioner filed a motion in the district court under Fed.R.Civ.P. 60(b)(6), seeking relief from the district court's 1998 judgment denying habeas relief. (J.A. 158) The Rule 60(b) motion likewise relied on Rule 39 and sought reconsideration of fourteen individual claims of prosecutorial misconduct (J.A. 165-66), ten of which had been denied as procedurally defaulted. (J.A. 57-8, 68)[2]

On November 27, 2001, the district court, concluding that petitioner's Rule 60(b) motion constituted a second or successive petition subject to 28 U.S.C. § 2244(b), transferred the matter to the Sixth Circuit pursuant to 28 U.S.C. § 1631. (J.A. 40) The district court also declined to issue a certificate of appealability on jurisdictional grounds. (J.A. 43) On November 30, 2001, petitioner filed a notice of appeal from the district court's action on the Rule 60(b) motion. (R. 268; J.A. 11)

On December 6, 2001, petitioner filed in the Sixth Circuit a motion requesting (1) a certificate of appealability from the district court's action on his Rule 60(b) motion; (2) *en banc* consideration of his appeal therefrom; and (3) consolidation with the previously filed motion to

[2] The district court had considered the substantive merits of the remaining four claims and denied relief on that basis. (J.A. 50, 69)

withhold the mandate and to rehear or remand. (J.A. 28) In the meantime, on January 15, 2002, the Tennessee Supreme Court set April 10, 2002, as the date for execution of petitioner's sentence. On January 18, 2002, a panel of the Sixth Circuit denied the application for a certificate of appealability and determined that the district court had properly construed petitioner's Rule 60(b) motion as a second habeas corpus petition, subject to 28 U.S.C. § 2244(b). (J.A. 35-6) On February 11, 2002, the same panel denied all of petitioner's pending motions, including his Rule 60(b) motion, which it construed as an application for leave to file a second habeas corpus petition, as well as his motion to withhold the mandate and for rehearing or remand of his original appeal. (J.A. 38)

SUMMARY OF THE ARGUMENT

In 1998, as part of its adjudication of petitioner's federal habeas petition, the district court denied relief on several of petitioner's claims, ruling that they were procedurally defaulted and that petitioner had failed to establish cause and prejudice or a fundamental miscarriage of justice. More than three years later, relying on the June 28, 2001, promulgation of a new rule – Tenn.Sup.Ct.R. 39 – petitioner sought to resurrect these claims by filing two post-judgment motions: a motion in the district court under Fed.R.Civ.P. 60(b)(6); and a motion to withhold the mandate in the court of appeals. Both courts properly rejected petitioner's effort to utilize these procedures to relitigate these habeas claims.

Petitioner's Rule 60(b) motion was properly construed as a "second or successive habeas corpus application"

under 28 U.S.C. § 2244(b) and, because it presented claims that were presented in petitioner's first petition, § 2244(b)(1) required its dismissal. The prior determination by the district court that petitioner's claims were procedurally defaulted constituted a final, conclusive adjudication of petitioner's claims. Unlike a dismissal without prejudice for failure to exhaust, a denial on grounds of procedural default contemplates that the petitioner *cannot* return to federal court in the future – the claim is barred from federal habeas review. Prior decisions of this Court, established habeas corpus practice, and the language and purpose of the statute dictate the conclusion that such an adjudication is on the merits and counts as a first petition, thus rendering any subsequent habeas petition "second or successive" within Congress' intended meaning of that phrase in § 2244(b).

Although petitioner styled his pleading as a motion under Fed.R.Civ.P. 60(b)(6), and not as another habeas petition, it nonetheless served as the functional equivalent of a new petition. While Rule 60(b)(6) purports to provide grounds for post-judgment relief on the basis of new law, its provisions do not apply to petitioners in habeas corpus cases because the practice for post-judgment habeas litigation in reliance upon new law is fully set forth by statute – 28 U.S.C. § 2244(b).

Petitioner's Rule 60(b)(6) motion reasserted his procedurally defaulted habeas claims in reliance upon the recent promulgation of Tenn.Sup.Ct.R. 39. That Rule 39 constitutes a new law cannot be seriously disputed; the Rule did not even exist when petitioner's claims were previously adjudicated. Because the motion relied upon a law that had not previously been considered by, or presented for consideration to, the district court, it was properly

regarded as a new habeas petition. Otherwise, petitioner would have been able to circumvent § 2244(b)'s restrictions simply by styling his pleading as a Rule 60(b) motion.

In addition to his Rule 60(b) motion filed in the district court, petitioner also filed in the court of appeals a motion requesting that, in light of Rule 39, the mandate be withheld, that rehearing en banc be granted to review the procedurally defaulted claims or, in the alternative, that the case be remanded to the district court for reconsideration of its procedural default rulings on the prosecutorial misconduct claims. In this Court, he asserts that the court of appeals abused its discretion in denying his motion.

But petitioner cannot demonstrate an abuse of discretion for several reasons. First, because his motion was filed in the court of appeals after this Court had denied certiorari, and because Fed.R.App.P. 41(d)(2)(D) requires a court of appeals to "issue the mandate immediately when a copy of a Supreme Court order denying the petition for a writ of certiorari is filed," the court of appeals had no discretion to stay its mandate. Under these circumstances, asking the court to stay its mandate was tantamount to requesting a recall of the mandate. But a motion to recall the mandate can be regarded as a second or successive application under 28 U.S.C. § 2244(b). And in this case, where petitioner's motion sought review of the district court's "merits" determination of procedural default on his prosecutorial misconduct claims, the motion clearly constituted such a second or successive application, which was required to be dismissed under § 2244(b)(1). It necessarily follows that the court of appeals' denial of the motion was not an abuse of discretion.

Second, even if petitioner's motion was not subject to § 2244(b), petitioner cannot demonstrate an abuse of discretion by the court of appeals in refusing to recall its mandate. Because the recall of a mandate can be exercised only in "extraordinary circumstances," is a power held in reserve only "against grave, unforeseen circumstances," and any use of the power disparages and frustrates the finality essential to our system of criminal justice and the federal balance, it can never be an abuse of discretion for a court of appeals to *refuse* to recall its mandate. Furthermore, in order to warrant a recall of a mandate, a petitioner must demonstrate that such an extraordinary act is necessary to avoid "a miscarriage of justice" defined by this Court's habeas jurisprudence, *i.e.*, "actual as compared to legal innocence." Resting solely upon a legal argument that Rule 39 applied to his claims, petitioner's motion was devoid of any assertion of "actual innocence."

Finally, even if petitioner's appellate motion is viewed simply as an ordinary motion – and not a motion to recall the mandate and a second or successive application under § 2244(b) – the court of appeals did not abuse its discretion by denying it. Petitioner had deliberately chosen not to challenge the district court's procedural default rulings in his appeal, and, as the court of appeals correctly observed, its decision "did not rest upon any procedural default." Because petitioner had chosen to abandon any challenge to the procedural default determination and then asserted the issue for the first time in his post-judgment motion, the court of appeals cannot be faulted for refusing to grant extraordinary relief on a question so belatedly raised.

Furthermore, application of Rule 39 would not have revived his prosecutorial misconduct claims anyway. "Available" state remedies must be exhausted under 28

U.S.C. § 2254 as a prerequisite for federal habeas corpus review. Petitioner's contention that Rule 39 makes a discretionary application to the Tennessee Supreme Court unavailable in criminal cases is belied by the plain text of the rule itself. Rule 39 simply provides that a litigant "shall not be required" to seek discretionary review in the supreme court; it does not make such review unavailable. But even if somehow the rule could be read to render such review unavailable, the rule could not alter the objective historical fact in this case that discretionary review was available in 1995, when petitioner chose not to present his prosecutorial misconduct claims to the Tennessee Supreme Court. Because Rule 39 cannot resurrect petitioner's procedurally defaulted claims anyway, the court of appeals did not abuse its discretion by refusing to consider them or remand the matter to the district court.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER'S RULE 60(B) MOTION CONSTITUTED A "SECOND OR SUCCESSIVE" PETITION BARRED UNDER 28 U.S.C. § 2244(b).[3]

Petitioner's Rule 60(b) motion reasserted several claims for habeas corpus relief that were presented, along with many others, in his original petition for habeas corpus relief. Relief on these several claims had been previously denied. (J.A. 60, 68)[4] 28 U.S.C. § 2244 provides, in relevant part:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

---

[3] Petitioner's lead argument (Pet. Br. 10), as well as the entire argument of the *amici* brief in support of petitioner, relates to the substantive merits of petitioner's underlying constitutional claims. But neither of the two questions before the Court, nor any "subsidiary question fairly comprised therein," U.S.Sup.Ct.R. 23(1)(c), implicates the substance of petitioner's underlying claims. Such arguments, therefore, are irrelevant and inappropriate and should be disregarded. Moreover, at least to the extent petitioner presented these claims to the state trial and intermediate appellate courts, they have been found to be without merit. *See* R. 9, Add. 15, p. 4; R. 9, Add. 11, T.R. p. 108.

[4] While petitioner's Rule 60(b)(6) motion reasserted claims that had been previously denied on the basis of procedural default, as well as claims that had been previously denied as being without substantive merit, the thrust of petitioner's argument in this Court is directed only to the procedurally defaulted claims. Accordingly, respondent confines his argument to those claims.

28 U.S.C. § 2244(b)(1). Accordingly, "[i]f [petitioner's] current request for relief is a 'second or successive' application, then it plainly should have been dismissed." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642 (1998).[5] Petitioner advances two primary arguments for why his Rule 60(b)(6) motion is not a "second or successive application" within the meaning of § 2244(b). First, he maintains that, because these claims were denied in his original habeas proceeding on the basis of a procedural default – in his words, because they "were not adjudicated on the merits" (Pet. Br. 24) – his motion is not "second or successive" at all. Second, he asserts that he is entitled to pursue relief from the district court's habeas judgment under Fed.R.Civ.P. 60(b) (Pet. Br. 40-42), and that the "substance" of his Rule 60(b) motion was to "seek[ ] an adjudication only of his claims ... set forth in his original petition" (Pet. Br. 33), thus raising the issue of whether petitioner's Rule 60(b) motion is itself a new "application" under § 2244(b). Petitioner's arguments, however, are unavailing on both scores.[6]

[5] Although petitioner has conceded that these "are not new claims," (J.A. 169), even construing them as such, they fail to meet the requirements of § 2244(b)(2), as the Sixth Circuit ruled. (J.A. 36)

[6] Petitioner also argues that the provisions regarding second or successive petitions set forth in 28 U.S.C. § 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. 104-132, 110 Stat. 1214, do not apply to his Rule 60(b) motion because his original petition was filed prior to the AEDPA's effective date. (Pet. Br. 27-28) But, as will be shown in Argument I.B, *infra*, because petitioner's Rule 60(b) motion constitutes a new habeas application, which was filed on November 2, 2001, this argument fails. *See Martinez-Villareal*, 523 U.S. at 640, 642 (applying AEDPA to decide whether petition filed in 1997 was "second or successive" under the Act, where original petition filed in 1993). *Cf. Slack v. McDaniel*, 529 U.S.

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A. The District Court's Prior Judgment, Ruling That Petitioner's Claims Were Procedurally Defaulted, "Counted" As a First Petition and Rendered The Reassertion of These Same Claims "Second or Successive" Under § 2244(b).

As a general matter, construction of statutory terms begins with the language of the statute itself. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Where, as here, claims for habeas corpus relief are presented to a district court in an original habeas petition, and relief is denied after an evidentiary hearing, including the denial of certain claims on the ground that the claims are barred by the petitioner's procedural default, logic would dictate that any subsequent petition or application reasserting those same claims would be "second or successive" under § 2244(b) within the plain meaning of that phrase. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 649 (Thomas, J., dissenting) (under "plain meaning" of the statute, a second petition, raising the same claim presented in a first petition that had been denied, was a "second or successive habeas corpus application" under § 2244(b)).

But in *Slack v. McDaniel*, 529 U.S. 473 (2000), a majority of this Court observed that "[t]he phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases." *Id.*, 529 U.S. at 486. From

473, 479, 486 (2000) (applying pre-AEDPA law to decide whether petition filed in 1995 was "second or successive"). *See also Calderon v. Thompson*, 523 U.S. 538, 545, 546, 553 (1998) (applying AEDPA to motion to recall mandate filed in 1997, where first petition filed in 1990).

a review of prior decisions and the "established practice" in pre-AEDPA habeas cases, the *Slack* Court held that "[a] habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state court remedies is not a second or successive petition." *Id.*, 529 U.S. at 485-86. In so holding, the Court adhered to the analysis in *Martinez-Villareal*, where a majority of the Court likewise held, utilizing pre-AEDPA law to interpret AEDPA's provisions, that where a claim was previously dismissed as premature, a second attempt to assert the claim is not "second or successive" under 28 U.S.C. § 2244(b). *Id.*, 529 U.S. at 489 (citing *Martinez-Villareal*, 523 U.S. at 644).

Petitioner seizes upon the Court's articulation of its holding in *Slack*, and argues that, in his case too, because his claims were procedurally defaulted, he did not receive an "adjudication on the merits." But petitioner reads too much into the Court's use of the "unadjudicated on its merits" language. The words that immediately follow that phrase in the Court's opinion – "*and dismissed for failure to exhaust state remedies*" – are important. If a habeas petition that has been dismissed without prejudice for failure to exhaust state remedies has not been adjudicated on its merits, and thus does not "count" as a first habeas petition so as to render a subsequent petition "second or successive" under the intended meaning of that phrase in § 2244(b), then when has a petition or claim been adjudicated on the merits so as to "count" as a first petition? The language and legislative history of the statute, established habeas practice both before and after enactment of AEDPA, prior decisions of this Court, and the policies underlying the enactment of AEDPA's amendments to § 2244(b) all point to the conclusion that Congress

intended that any final and conclusive determination of a habeas claim, *i.e.*, a dismissal or denial *with* prejudice – the converse of the *Slack* holding – should "count" as a first petition and thus render any subsequently filed petition "second or successive" under § 2244(b).

1. Prior Decisions of This Court And Established Habeas Practice In the Vast Majority of the Circuit Courts, Both Before and After Enactment of AEDPA, Support The Conclusion That a Procedural Default Judgment Is An Adjudication On the Merits And "Counts" As a First Petition.

As this Court recently observed in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), the meaning of "on the merits" has evolved over the years. The original connotation of the phrase contemplated an adjudication "that actually 'pass[es] directly on the substance of [a particular] claim before the court.'" *Id.*, 531 U.S. at 501-02 (quoting Restatement (Second) of Judgments § 19, Comment a, p. 161 (1980)). To be sure, this Court has utilized the phrase "on the merits" to refer to the *substantive* merits of a claim. *See, e.g., Slack*, 529 U.S. at 484 (equating a court's rejection of constitutional claims "on the merits" with its having "reach[ed] the underlying constitutional claims"). That the phrase carries this connotation no doubt serves as the unstated premise of petitioner's contention that his procedurally defaulted claims were not adjudicated "on the merits."

But "on the merits" has also come to be applied to judgments that *do not* pass upon the substantive merits of a claim – those that instead are based on some other

ground that nevertheless finally determines the action. *Semtek*, 531 U.S. at 502-03. For example, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), a case involving a provision of the Securities Exchange Act that purported to authorize the reopening of actions previously dismissed as time-barred, the Court pointed out the irrelevancy of the fact that the final judgments affected by the statutory provision in question rested on a statute of limitations bar:

> The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute; as *a judgment on the merits*.

Id., 514 U.S. at 228 (citing *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1918)) (emphasis added).[7] In *Semtek* itself, the Court held that an "adjudication on the merits" under Fed.R.Civ.P. 41(b) is merely the converse of the dismissal without prejudice provided for under Fed.R.Civ.P. 41(a), *i.e.*, a dismissal *with* prejudice.[8]

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[7] *See also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("[t]he dismissal for failure to state a claim . . . is a "judgment on the merits"); *McKeesport Area School Dist. v. Pennsylvania Dep't of Educ.*, 446 U.S. 970, 971 (1980) (White, J., concurring) ("a ruling of dismissal for want of a substantial federal question is a judgment on the merits").

[8] The Court in *Slack*, pointing to a court's ability to dismiss with prejudice under Rule 41(b) so as to avoid "vexatious litigation," implied that such a dismissal would bar further litigation under the successive petition doctrine. *Slack*, 529 U.S. at 489.

The dismissal or denial of a habeas claim on the basis of procedural default is properly included within this latter category of adjudications on the merits. This conclusion is dictated by the critical difference between the effect of a dismissal of a claim without prejudice for failure to exhaust state court remedies and the effect of a dismissal or denial of a claim on grounds of procedural default. In the former situation, the dismissal contemplates that the petitioner *could* return to federal court at some point in the future, either upon exhaustion of his claim in state court or upon his claim becoming ripe. *See Slack*, 529 U.S. at 486; *Martinez-Villareal*, 523 U.S. at 643. But when a claim is denied for procedural default, the petitioner cannot return to federal court – his claim is barred outright from federal habeas review, for "a state procedural default of any federal claim will bar federal habeas unless the petitioner demonstrates cause and actual prejudice." *Coleman v. Thompson*, 501 U.S. 722, 748 (1991).

Courts of appeals have pointed to this fundamental distinction between dismissals without prejudice for failure to exhaust and dismissals for procedural default to hold that a "dismissal for procedural default is a dismissal on the merits. It is critically different from a dismissal for failure to exhaust which does not prevent federal habeas review at a later date." *Harvey v. Horan*, 278 F.3d 370, 380 (4th Cir. 2002). "Unlike a procedural default, a mere failure to exhaust state remedies does not result in a dismissal 'on the merits' and does not cause a forfeiture of access to federal habeas review." *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000). *See also Turner v. Artuz*, 262 F.3d 118, 122 (2d Cir.), *cert. denied*, 122 S.Ct. 569 (2001); *Howard v. Lewis*, 905 F.2d 1318, 1322 (9th Cir. 1990); *In re Page*, 179

F.3d 1024, 1025 (7th Cir. 1999) (there is an "essential distinction" between a dismissal "for technical procedural reasons" and a dismissal "on the merits").

Petitioner contends, however, that "[t]his distinction wholly lacks substance" (Pet. Br. 33) because, "'[i]n both situations, the habeas petitioner [did] . . . not receive an adjudication of his claim.'" (Pet. Br. 34 (quoting *Martinez-Villareal*, 523 U.S. at 645)) But petitioner *did* receive an adjudication of his claim – an adjudication that he has failed properly to exhaust his claim; that he has failed to demonstrate cause and prejudice or a fundamental miscarriage of justice; and that, consequently, his right to obtain federal review of his claims is barred by the procedural default. (J.A. 60, 62, 68) As the Ninth Circuit explained in *Howard v. Lewis*:

> While a court, in dismissing a petition because of state procedural default (and a failure to show cause and prejudice), is not determining the merits of the underlying claims, *it is making a determination on the merits that the underlying claims will not be considered* by a federal court for reasons of comity. Such a determination should be considered "on the merits" for purposes of the successive petition doctrine.

905 F.2d at 1322 (citations omitted) (emphasis added). "A fundamental precept of common-law adjudication . . . is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . . " *Montana v. United States*, 440 U.S. 147, 153 (1979).

Indeed, every circuit court that has directly addressed the issue has held, both before and after enactment of

AEDPA, that a dismissal or denial of a habeas claim on grounds of procedural default constitutes an adjudication "on the merits" for purposes of determining whether a subsequent petition will be barred as second or successive. Under pre-AEDPA law, the Fifth, Eighth, Ninth and Tenth Circuits all held that a determination that a claim was procedurally defaulted constituted an adjudication "on the merits" under Rule 9(b) of the Rules Governing Section 2254 Proceedings in the United States District Courts.[9] Insofar as the language "second or successive" appears in both Rule 9(b) and in AEDPA amendments to § 2244(b),[10] Congress may be presumed to have had knowledge of this interpretation of the phrase "on the merits" for purposes of second or successive petitions when it enacted AEDPA in 1996. *See Lorillard v. Pons,* 434 U.S. 575, 581 (1978). Since enactment of AEDPA, the Second, Fourth and Sixth Circuits have followed the principle exemplified by these cases, likewise holding that a procedural default ruling is a judgment "on the merits" that renders any subsequent

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[9] *See Hawkins v. Evans*, 64 F.3d 543, 547 (10th Cir. 1995); *Bates v. Whitley*, 19 F.3d 1066, 1067 (5th Cir. 1994); *Shaw v. Delo*, 971 F.2d 181, 184 (8th Cir. 1992); *Howard*, 905 F.2d at 1323. *See also Caton v. Clarke*, 70 F.3d 64, 65 (8th Cir. 1995) ("[a] determination of an unexcused state procedural bar is a final determination on the merits for purposes of 28 U.S.C. § 2244(b)").

[10] Rule 9(b), promulgated in 1976, provides that "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

petition "second or successive" under 28 U.S.C. § 2244(b).[11] Furthermore, while the Seventh Circuit has not explicitly so held, post-AEDPA decisions from that court reflect its agreement that a procedural default judgment is a judgment on the merits for purposes of applying § 2244(b).[12]

These cases serve to establish a majority rule among the circuit courts of appeal – a rule that the Second Circuit, echoing the rationale employed by the Ninth Circuit twelve years before,[13] recently had occasion to reiterate:

> We consider the denial of procedurally defaulted claims to be "on the merits" even though the underlying merits of those claims are not reviewed by any federal court because those claims, regardless of their merit, can never establish a basis for habeas relief. Thus our distinction between petitions that are denied "on the merits" and those that are not does not depend on whether the federal court actually determined the merits of the underlying claims but rather on *whether the prior denial of the petition conclusively determined that the claims presented could not establish a ground for federal habeas relief.*

Graham v. Costello, 299 F.3d 129, 133 (2d Cir. 2002) (extending principle to hold that denials of relief under the *Stone v. Powell*[14] bar to review of a Fourth Amendment claim is an adjudication on the merits) (emphasis added). In short, as the lower courts have uniformly held, "[a] petition that has reached final decision counts" for purposes of § 2244(b)'s restrictions against "second or successive" applications. *Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999).[15]

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[11] *See Harvey*, 278 F.3d at 379; *Turner*, 262 F.3d at 122; *In re Cook*, 215 F.3d at 608; *Carter v. United States*, 150 F.3d 202, 205-06 (2d Cir. 1998) (§ 2255).

[12] *See In re Page*, 179 F.3d at 1024 (distinguishing petitions dismissed for "technical procedural reasons," court noted that first petition, which included procedurally defaulted claims, "was denied on the merits"); *Benton v. Washington*, 106 F.3d 162, 164-65 (7th Cir. 1996) ("a decision on the [substantive] merits is not essential to the existence of a first petition;" while petitions dismissed for failure to pay filing fee or to permit exhaustion should be disregarded, "any other outcome is presumptively sufficient to bring § 2244(b) into play").

[13] *Sanders v. United States*, 373 U.S. 1, 16 (1963), does not aid petitioner's cause for two reasons. First, while the *Sanders* Court stated that an "adjudication of the merits" is one that follows an evidentiary hearing at which factual issues are resolved, Congress expanded that definition in 1966 to further provide that controlling effect be given a prior adjudication made "after a hearing on the merits of an issue of law." 28 U.S.C. § 2244(b) (1994). As discussed above, a procedural default judgment is rendered "on the merits of an issue of law." *See Caton*, 70 F.3d at 65. Second, as discussed in the following section, AEDPA struck all "on the merits" language from § 2244(b).

[14] 428 U.S. 465 (1976).

[15] Petitioner contends that the procedural default judgment of the district court in his case was not final until the appellate mandate was issued. While it may be correct that an appeal transfers jurisdiction to the court of appeals until issuance of the mandate, it is settled that finality attaches *for preclusion purposes* at the time of the entry of judgment in the district court, any appeal notwithstanding. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941). *See generally* 18 J. Moore, *Moore's Federal Practice*, § 131.30[2][b],[c], pp. 131-95 to -97 (3d ed. 2002). Moreover, petitioner did not appeal the procedural default rulings of the district court, thus ensuring their finality. Lastly, the appeal that petitioner *did* take had been decided, and this Court had denied certiorari, when petitioner sought to resurrect his procedurally defaulted claims.

2. Interpreting "Second or Successive" Applications to Include Subsequent Applications Filed After a Prior Procedural Default Judgment Is Consistent With The Purpose of AEDPA's Amendments to § 2244(b).

Nothing in the language or history of AEDPA's amendments to 28 U.S.C. § 2244(b) evinces a Congressional intent to exclude from the definition of a "second or successive habeas corpus application" those applications filed after a prior judgment of procedural default. The clear purpose of these amendments was to *enhance and strengthen* the pre-AEDPA restrictions on successive petitions – *not* to relax them. In addition to codifying some of the pre-existing limits on successive petitions, AEDPA "further restricts the availability of relief to habeas petitioners." *Felker v. Turpin,* 518 U.S. 651, 664 (1996). *See Dunn v. Singletary*, 168 F.3d 440, 442 (11th Cir. 1999) (purpose of AEDPA's gatekeeping provisions was "to restrict habeas petitioners from taking multiple bites of the apple"); *accord Castro v. United States*, 290 F.3d 1270, 1274 (11th Cir. 2002); *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998). Pre-AEDPA law itself dictated that federal courts limit consideration of subsequent habeas petitions to "rare cases." *Kuhlman v. Thompson*, 477 U.S. 436, 454 (1986). Marking yet another step in the ongoing evolutionary process of habeas corpus law,[16] Congress clearly

[16] *Compare Sanders v. United States*, 373 U.S. 1, 8 (1963) ("res judicata is inapplicable in habeas proceedings"), *with McCleskey v. Zant*, 499 U.S. 467, 486 (1991) (1966 amendments to § 2244(b) "establishe[d] a 'qualified application of the doctrine of res judicata'") *and with Felker v. Turpin*, 518 U.S. 651, 664 (1996) (1996 amendments to

(Continued on following page)

intended, in enacting AEDPA, to limit post-judgment litigation in habeas cases to even narrower circumstances.

> This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases . . . *Successive petitions* must be approved by a panel of the court of appeals and *are limited to those petitions that contain newly discovered evidence that would seriously undermine the jury's verdict or that involve new constitutional rights that have been retroactively applied by the Supreme Court.*

Joint Explanatory Statement of the Committee of Conference, H.Conf.Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. 944 (emphasis added).[17]

§ 2244(b) "constitute a modified res judicata rule" and "the added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process").

[17] Immediately upon Senate passage of Senate Bill 735, which would be subsequently enacted into law as AEDPA, Senator Dole made the following statement regarding the legislation:

> The most critical element of this bill . . . is the provision reforming the so-called habeas corpus rules. By imposing filing deadlines on all death row inmates, and *by limiting condemned killers convicted in State or Federal court to one Federal habeas petition – one bite of the apple* – these landmark reforms will go a long, long way to streamline the lengthy appeals process and bridge the gap between crime and punishment in America. It is dead wrong that we must wait 8, or 9, or even 10 years before a capital sentence is actually carried out.

141 Cong. Rec. S7803-01, 7877 (daily ed. June 7, 1995) (statement of Sen. Dole) (emphasis added).

If there remained any doubt that Congress intended to have a claim denied on procedural default grounds "count" as a first habeas petition, Congress conclusively removed it by jettisoning all "on the merits" language from § 2244(b). As noted above, the predecessor version of § 2244(b) provided, in pertinent part:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ. . . .

28 U.S.C. § 2244(b) (1994). The 1996 amendments completely reworked subsection (b), replacing it with subsections (b)(1) through (b)(4). Subsection (b)(1) now provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

Period. "Congress enacted AEDPA against a backdrop of federal habeas law dealing with procedurally barred claims," *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999), and its intent on this point cannot have been any plainer. A final determination of the claims is all that is needed for the prior application to count as a first petition.

3. Policy Concerns Underlying Federal Habeas Corpus Review and the Finality of Judgments Support the Interpretation That A "Second or Successive" Habeas Application Includes a Subsequent Petition Filed After a Prior Procedural Default Judgment.

This Court has often recognized that federal habeas review of state court convictions "entails significant costs," *Wright v. West*, 505 U.S. 277, 293-94 (1992) (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982)), and that these costs, as well as the countervailing benefits, namely, a state prisoner's opportunity to obtain federal review of a state court's adjudication of federal constitutional questions, "must be taken into consideration in defining the scope of the writ." *Id.*, 505 U.S. at 291. The procedural default doctrine emanates from this cost-benefit analysis, as does the *Teague* retroactivity bar,[18] as well as the successive petition doctrine itself. *Id.*; *Sawyer v. Whitley*, 505 U.S. 333, 338-39 (1992). In the final analysis, of course, "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)).

In the interest of preserving this balance, this Court has encouraged, if not insisted, that federal courts sitting in habeas review of state court judgments dispose of presented claims on any available procedural grounds – without reaching the underlying merits. While a procedural bar issue need not "invariably" be resolved first, "it

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[18] *Teague v. Lane*, 489 U.S. 288 (1989).

ordinarily should be." *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997).

> [A]lthough federal courts at all times retain the power to look beyond state procedural forfeitures, *the exercise of that power ordinarily is inappropriate* unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and "actual prejudice resulting from the alleged constitutional violation."

Smith v. Murray, 477 U.S. 527, 533 (1986) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977); *Murray v. Carrier*, 477 U.S. 478, 485 (1986)) (emphasis added).[19] It would be strange indeed for a federal habeas court, having heeded such directives and adjudicated a habeas claim or petition on grounds of a state procedural default, to learn that such a judgment is not a final adjudication "on the merits" and thus is subject to endless relitigation by way of a subsequent habeas petition. Any habeas petitioner who can assemble a new argument for why he now has cause and prejudice or can now show a fundamental miscarriage of justice to excuse his prior procedural default, could relitigate the prior denial or dismissal of his claims.

Such a scenario would strip the federal judgment of any sense of finality – a circumstance that offends the very interest on which the procedural default doctrine is grounded. *See Smith*, 477 U.S. at 533; *Murray*, 477 U.S. at

[19] *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (if State argues a *Teague* retroactivity bar to habeas claim, "the court *must* apply *Teague* before considering the merits of the claim") (emphasis in original); *accord Horn v. Banks*, 122 S.Ct. 2147 (2002).

487.[20] It also would run counter to the treatment of such judgments for purposes of appeal. *See Slack*, 529 U.S. at 484 (requiring additional showing to warrant certificate of appealability that correctness of district court's procedural ruling is debatable). Moreover, such a scenario would fly in the face of what Congress intended to accomplish when it enacted AEDPA's amendments to § 2244(b). But this is the result that would attach if the phrase "second or successive" means that a prior application must have been adjudicated on the substantive merits of the claims it presented.

[20] The potential ramifications of such a holding are by no means insignificant. A 1995 Justice Department report found that 63% of the 5,000-plus habeas corpus claims reviewed were dismissed, and that 12% of these were dismissed on procedural default grounds. U.S. Dep't of Justice, Office of Justice Programs, *Federal Habeas Corpus Review, Challenging State Court Criminal Convictions* 17 (1995). While respondent's experience suggests a far higher procedural default percentage, particularly in capital cases – indeed, the report itself cautioned against making generalizations from the study's results – even these figures represent a sizable number of final judgments that would no longer be "final." In the year 2000, more than 21,000 habeas petitions were filed by state prisoners; another 9,000 some-odd petitions were filed by federal prisoners. U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoner Petitions Filed in U.S. District Courts, 2000, With Trends 1980-2000* 1 (Jan. 2002). Petitioner's insistence that his circumstances are unique (Pet. Br. 45), overlooks any number of similarly situated Tennessee prisoners who would likewise find themselves free of the restrictions against successive petitions; they too could then seek to reopen claims previously adjudicated as procedurally defaulted. In that event, the Tennessee Supreme Court would have succeeded in reducing its own discretionary review docket, but only at the expense of the federal courts' burgeoning habeas corpus docket.

B. Petitioner's Rule 60(b)(6) Motion Is Properly Construed As the Functional Equivalent of a Second or Successive Habeas Corpus "Application" Under 28 U.S.C. § 2244(b).

Petitioner, of course, did not style the pleading he subsequently filed in the district court, reasserting his procedurally defaulted habeas claims, as a petition for writ of habeas corpus. Instead, he styled this pleading a motion for relief from judgment under Fed.R.Civ.P. 60(b)(6). Petitioner maintains that such a pleading falls outside the reach of § 2244(b)'s restrictions against second or successive habeas applications. But because petitioner's pleading was, but for its title, the practical equivalent of a habeas application, relying on a new law to reassert habeas claims, the Sixth Circuit was correct to construe, and then deny, it as a second or successive habeas corpus application under § 2244(b).

Fed.R.Civ.P. 60(b) was originally adopted to provide "a new system to govern requests to reopen judgments." *United States v. Beggerly*, 524 U.S. 38, 43 (1998). The Rule provides that, "[o]n motion and upon such terms as are just," a court may relieve a party from a final judgment, order or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence;
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;

> (5) the judgment has been satisfied, released, discharged, or should no longer have prospective application, or a prior judgment on which it is based has been reversed or vacated; or,
>
> (6) any other reason justifying relief from the operation of the judgment.

These six grounds are mutually exclusive and, despite the "catch-all" nature of Clause (6), it may not be used as a vehicle for circumventing clauses (1) through (5). *Liljeberg v. Health Serv's Acquisition Corp.*, 486 U.S. 847, 863 and n.11 (1988). Accordingly, a movant seeking relief under Clause (6) – the ground invoked by petitioner – must demonstrate "extraordinary circumstances." *Klapprott v. United States*, 335 U.S. 601, 613 (1949). *See generally* 12 *Moore's Federal Practice* § 60.48[1]-[3], pp. 60-166 to -171.

In *Slack*, 529 U.S. at 489, this Court observed, in dicta, that the Federal Rules of Civil Procedure are applicable in habeas proceedings "as a general matter." At first blush, then, Rule 60(b) would appear to provide a vehicle to habeas petitioners for reopening and relitigating a previously adjudicated habeas petition and thus avoiding the clear intent of Congress in enacting AEDPA. But first blushes usually fade, and this one does as well.

1. The Provisions of Fed.R.Civ.P. 60(b) Are Not Wholly Applicable In Habeas Proceedings.

"[T]he Federal Rules of Civil Procedure apply in habeas proceedings only 'to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.'" *Browder v. Dir., Dep't of Corrections of Ill.*, 434

U.S. 257, 269 (1978) (quoting Fed.R.Civ.P. 81(a)(2)).[21] Put another way, where the practice for habeas proceedings *is* set forth by statute, that practice "takes precedence over the Federal Rules." *Id.*, 434 U.S. at 269 n.14. In *Pitchess v. Davis*, 421 U.S. 482 (1975), for example, this Court held that a new contention raised by a habeas petitioner in a post-judgment motion was subject to the statutory requirement that available state remedies be exhausted as a precondition to consideration of a federal habeas petition.[22] The Court relied upon the provisions of Fed.R.Civ.P. 81(a)(2) to reject the petitioner's argument that the statutory exhaustion requirements were inapplicable because he had asserted his claim under Fed.R.Civ.P. 60(b):

> Since the exhaustion requirement is statutorily codified, even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command.

Pitchess, 421 U.S. at 489.

Conversely, of course, where a federal statute does not provide for the practice or procedure involved in a habeas proceeding, the Federal Rules will govern. Three years after its decision in *Pitchess*, this Court held, in *Browder*, 434 U.S. 257, that the time limits for filing motions to reconsider under Fed.R.Civ.P. 52(b) and 59 applied in habeas cases. While acknowledging that "some aspects of the Federal Rules of Civil Procedure may be inappropriate

[21] Rule 11 of the Rules Governing Section 2254 Proceedings in the United States District Courts likewise provides that the Federal Rules of Civil Procedure may be applied in habeas proceedings "to the extent that they are not inconsistent with these rules."

[22] *See* 28 U.S.C. § 2254(b) and (c) (1994).

for habeas proceedings," the Court found that no habeas statute addressed the timeliness of a motion to reconsider, that the time limits set forth in the Civil Rules were "well-suited" to the special character of habeas proceedings, and that application of those time limits would be "thoroughly consistent with the spirit of the habeas corpus statutes." *Id.*, 434 U.S. at 271.

Petitioner's case presents a far different scenario than that involved in *Browder*. The practice for relitigating a previously adjudicated habeas petition is comprehensively set forth in a federal statute, namely, 28 U.S.C. § 2244(b). In § 2244(b), Congress specifically limited such renewed litigation by a habeas petitioner to that based either on new evidence or new law, and it established specific and restrictive standards to govern such litigation.[23] Where a petitioner seeks to litigate a new claim, *i.e.*, one "that was not presented in a prior application," he must show either (1) that the claim relies on a new rule of constitutional law, made retroactive by this Court, or (2) that the claim relies on newly discovered evidence that would establish, by clear and convincing evidence, that the petitioner would not have been found guilty. 28 U.S.C. § 2244(b)(2). Otherwise, the claim shall be dismissed. *Id.* Where, as here, a petitioner seeks to relitigate a prior claim, *i.e.*, one "that was presented in a prior application," he may not. The

[23] Petitioner's reliance on instances in which the government has utilized Rule 60(b) in a habeas case is misplaced. The government, of course, is not pursuing habeas relief and therefore is not seeking to circumvent § 2244(b)'s restrictions against a new "habeas corpus application."

statute requires that it be dismissed. 28 U.S.C. § 2244(b)(1).

Moreover, to the extent that a direct conflict exists between the provisions of 28 U.S.C. § 2244(b) and Fed.R.Civ.P. 60(b), the two cannot mutually coexist. Rule 60(b)(2), while not at issue in this case, represents the most obvious example of inconsistencies between the two laws. That clause of the Rule provides, on its face, for relief from judgment on the basis of newly discovered evidence. But this rule runs headlong into § 2244(b)(2)'s provisions for the litigation of new claims relying on newly discovered evidence. Furthermore, Rule 60(b)(2) runs completely counter to § 2244(b)(1)'s provisions, which prohibit *any* reliance by a petitioner on newly discovered evidence to relitigate previously presented claims.

Rule 60(b)(6) – the ground on which petitioner based his Rule 60(b) motion – likewise conflicts with § 2244(b) insofar as the Rule provides for relief from judgment on the basis of new law. While "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)," *Agostini v. Felton*, 521 U.S. 203, 239 (1997), changes in decisional law, when combined with other factors, might warrant relief, as may unexpected changes in statutory law. *See* 12 *Moore's Federal Practice*, § 60.48[5][b]-[d], pp. 60-181 to -184, and cases cited. Indeed, petitioner's 60(b) motion, which relies on the intervening promulgation of Tenn.Sup.Ct.R. 39, seeks to invoke relief under Clause (6) on just such a basis. But again, any ability of a petitioner to rely on new law as the basis for a motion under Rule 60(b)(6) conflicts directly with § 2244(b)(2), which restricts litigation of new claims to those relying on new rules of constitutional law that have been made retroactive.

Similarly, because § 2244(b)(1)'s uncompromising terms prohibit *any* reliance by a petitioner on new law to relitigate previously presented claims, Rule 60(b)(6) also creates a conflict with this provision of the habeas statute.[24] This inconsistency between the statute and the Civil Rule demands that Rule 60(b) give way and that § 2244(b) take precedence. *Cf. Browder,* 434 U.S. at 271. Accordingly, where a habeas petitioner utilizes Rule 60(b) to raise new claims, new evidence or new law, his motion is properly construed as a second or successive habeas petition subject to § 2244(b)'s restrictions. A contrary conclusion would allow Rule 60(b) to "alter the statutory command." *Pitchess,* 421 U.S. at 489.

Deference to the primacy of § 2244(b)'s provisions in the context of post-judgment habeas litigation makes perfect sense from a policy standpoint. Rule 60(b) represents a "balancing of [the] need for justice against [the] value of finality of judgments," 12 *Moore's Federal Practice* § 60.02[2], p. 60-21 n.6,[25] but it is necessarily a balance that has been struck in the context of a typical civil case. By contrast, habeas corpus review, as previously discussed, involves other costs and benefits that do not present themselves in the typical civil case. *See Coleman*,

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[24] To the extent that new law may also be relied upon as the basis for a motion under Rule 60(b)(1) alleging "mistake, inadvertence, surprise or excusable neglect" (*see Morris v. Adams-Millis Corp.*, 758 F.2d 1352, 1358-59 (10th Cir. 1985) and cases cited; 12 *Moore's Federal Practice* § 60.41[4][b], pp. 60-102 to -113), the same conflict exists between the Civil Rule and the Habeas Statute.

[25] *See Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 271 (3d Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3093 (U.S. July 2, 2002) (No. 02-54).

501 U.S. at 747-48; *see also Browder*, 434 U.S. at 269 ("[p]erhaps in recognition of the differences between general civil litigation and habeas corpus proceedings," Fed.R.Civ.P. 81(a)(2) limits application of the Civil Rules where the practice is set forth by statute). As discussed above, § 2244(b), particularly after its amendment by AEDPA, represents Congress' view of the appropriate balance to be struck in the habeas context when it comes to allowing any additional litigation after a habeas petition has been decided. This balance ought not be upset by overlaying and frustrating the statute's provisions with rules that have been established with other interests in mind.

2. Subjecting Rule 60(b) Motions That Raise New Claims, New Evidence or New Law To the Restrictions Against Second or Successive Habeas Petitions Is Consistent With Prior Decisions of This Court and the Vast Majority of the Circuit Courts.

This Court has previously expressed its unanimous support for the proposition that a second or successive habeas petition may not be filed under the guise of some other post-judgment pleading. In *Calderon v. Thompson*, 523 U.S. 538 (1998), a case involving a habeas petitioner's motion in the Ninth Circuit Court of Appeals to recall the mandate on the basis of new evidence, the Court determined that a habeas petitioner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). "Otherwise, petitioners could evade the bar against relitigation of claims

presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Id.*, 523 U.S. at 553.[26] *See Gomez v. U.S. Dist. Ct. N.D. Calif.*, 503 U.S. 653 (1992) (state prisoner's use of 42 U.S.C. § 1983 action to raise new claim challenging method of execution was "an obvious attempt to avoid" the bar against successive claims).

While the four-member minority in *Calderon* disagreed regarding the appropriate standard that should govern review of a circuit court's recall of its mandate, even the dissenting opinion admits that "[a]ll would agree . . . that the sua sponte recall of mandates could not be condoned as a mechanism to frustrate the limitations on second and successive habeas petitions." *Calderon*, 523 U.S. at 569 (Souter, J., dissenting). In a footnote immediately following this statement, the dissent observes:

> The Ninth Circuit itself seems to recognize that a motion to recall the mandate filed by a petitioner subsequent to a previous request for federal habeas relief is analogous to a second or successive petition that is subject to the constraints of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

Id., 523 U.S. at 569 n.1 (citing *Nevius v. Sumner*, 105 F.3d 453, 461 (9th Cir. 1996)).

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[26] The majority went on to conclude, however, that § 2244(b)'s restrictions did not apply because the mandate had been recalled on the exclusive basis of the petitioner's first habeas petition. Nevertheless, the majority did hold that a *sua sponte* recall of the mandate under such circumstances must be done in a manner consistent with the objects of the statute. *Calderon*, 523 U.S. at 554.

The Ninth Circuit is far from alone in this view. "Appellate courts agree that a post-judgment motion under Fed.R.Civ.P. 60(b) in the district court, or the equivalent motion in the court of appeals – which is to say, a motion to recall the mandate – is a 'second or successive' application for purposes of § 2244(b)." *Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997) (citing *Ruiz v. Norris*, 104 F.3d 163 (8th Cir. 1997); *Felker v. Turpin*, 101 F.3d 657 (11th Cir. 1996); *Mathenia v. Delo*, 99 F.3d 1476 (8th Cir. 1996)). *See United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998) ("there is a trend among circuit courts to look beyond the formal title affixed to a motion if the motion is the functional equivalent of a motion under § 2255"). Indeed, every circuit court to have addressed this issue – save one – has ruled that a post-judgment motion in a habeas case, whether that motion be a Rule 60(b) motion in the district court or a motion to remand or to recall the mandate in the court of appeals, that raises new claims, new evidence or new law is properly treated or construed as the functional equivalent of a second or successive habeas corpus petition.[27]

[27] *See Thompson v. Nixon*, 272 F.3d 1098, 1100 (8th Cir. 2001), *cert. dismissed*, 122 S.Ct. 1988 (2002) (motion to recall mandate; new law); *Gray-Bey v. United States*, 209 F.3d 986, 988 (7th Cir. 2000) (motion to recall mandate; new claims); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc) (60(b) motion; new evidence); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (60(b) motion; new law); *Rich*, 141 F.3d at 552 (60(b) motion; new law); *Burris*, 130 F.3d at 783 (motion to recall mandate; new evidence); *Felker*, 101 F.3d at 660 (60(b) motion; new evidence); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) (60(b) motion; new claims); *Hunt v. Nuth*, 57 F.3d 1327, 1339 (4th Cir. 1995) (60(b) motion; new claims); *Guinan v. Delo*, 5 F.3d 313, 317 (8th Cir. 1993) (60(b) motion; new evidence); *Kyles v. Whitley*, 5 F.3d 806, 808 (5th Cir. 1993), *rev'd on other grounds*, 514 U.S. 419 (1995) (60(b)

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These decisions are based on the same rationale endorsed by all nine members of the Court in *Calderon* – that a habeas petitioner should not be allowed to avoid the restrictions against second or successive petitions. "Otherwise the statute would be ineffectual. Instead of meeting the requirements of § 2244(b), the petitioner would restyle his request as a motion for reconsideration in the initial collateral attack and proceed as if the AEDPA did not exist." *Burris*, 130 F.3d at 783.

> Rule 60(b) cannot be used to circumvent restraints on successive habeas petitions. That was true before the [AEDPA] was enacted, and it is equally true, if not more so, under the new act.

Felker v. Turpin, 101 F.3d at 661. *See Bonin v. Vasquez*, 999 F.2d 425, 426 (9th Cir. 1993) ("a Rule 60(b) motion following the entry of final judgment in a habeas case raises policy concerns similar to those implicated by a second petition").[28]

motion; new claims); *Clark v. Lewis*, 1 F.3d 814, 825-26 (9th Cir. 1993) (60(b) motion; new claim); *Williams v. Whitley*, 994 F.2d 226, 230 and n.2 (5th Cir. 1993) (60(b) motion; new law); *Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992) (60(b) motion; new claims); *Jones v. Murray*, 976 F.2d 169, 173 (4th Cir. 1992) (60(b) motion; new law); *Smith v. Armontrout*, 888 F.2d 530, 540 (8th Cir. 1989) (motion to remand; new claims); *Lindsey v. Thigpen*, 875 F.2d 1509, 1515 (11th Cir. 1989) (60(b) motion and motion to recall mandate; new law and new claims). *See also Landano v. Rafferty*, 897 F.2d 661, 668 and n.10 (3d Cir. 1990) (evaluating 60(b) motion as habeas petition to require exhaustion and viewing reopening of habeas petition by this method "problematic").

[28] *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001) stands alone in the minority view. But *Rodriguez*' two rationales are not persuasive. The first – that, unlike a habeas petition, a Rule 60(b)

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3. Petitioner's Rule 60(b) Motion Raises New Law to Reassert Previously Presented Claims For Habeas Corpus Relief.

Petitioner's Rule 60(b) motion reintroduces several of the habeas claims that were presented in his original petition; it also raises and relies upon Tenn.Sup.Ct.R. 39 as support for doing so. It cannot be seriously disputed that Rule 39 is a new law. The rule was promulgated by the Tennessee Supreme Court on June 28, 2001; it did not even exist at the time that petitioner's original petition was filed or decided. Petitioner himself has admitted that the promulgation of Rule 39 "made [the] Rule 60(b) motion possible," (J.A. 184 n.2); prior to the Rule's promulgation, petitioner had no basis for seeking to renew these claims.

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motion "seeks only to vacate the federal court judgment dismissing the habeas petition" and thus "merely ... open[s] the way for further proceedings seeking ultimately to vacate the conviction," *id.*, 252 F.3d at 198 – begs the question. Even if a Rule 60(b) motion "merely ... open[s] the way" to a renewed challenge to the state court conviction, it is the very "way" that the restrictions against successive petitions were intended to close. The second – that "the grounds asserted in support of the motion under Rule 60(b) may well have nothing to do with the alleged violations of federal rights ... asserted as a basis for the habeas," *id.*, 252 F.3d at 199 – ignores the fact that the habeas judgment itself "may well have nothing to do with the alleged violations of federal rights ... asserted as a basis for habeas," but is nonetheless a final, conclusive judgment. It renders any new effort to relitigate it "second or successive." *See Williams*, 994 F.2d at 230 and n.2 (assertion of new law to challenge denial under *Teague* non-retroactivity rule "best viewed as yet another habeas petition"); *Bolder v. Armontrout*, 983 F.2d 98, 99 (8th Cir. 1992) (assertion of new argument for cause to excuse procedural bar treated as "the equivalent of a second petition").

Nonetheless, petitioner argues that Rule 39 is not a new law at all; he contends that Rule 39 serves merely to "clarify" existing law in Tennessee regarding what steps a prisoner must take in state court in order to exhaust available remedies for purposes of federal habeas review. But even if petitioner were correct on this point – and he most assuredly is not[29] – his point is irrelevant. The only relevant inquiry is whether some new matter – a new law, new evidence, or a new claim – has been presented to the court for consideration that was not previously before the court when it entertained the original habeas application. As this Court discussed in *Calderon*, 523 U.S. at 554, the

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[29] There is no evidence to support petitioner's contention that, prior to the promulgation of Rule 39, discretionary review by the Tennessee Supreme Court was in any way unavailable as part of the regular appellate process or that a state prisoner did not need to pursue that remedy in order to exhaust available state remedies for purposes of federal habeas review. *See* Argument, Sec. II.B., *infra*. Indeed, even before this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the rule in the Sixth Circuit was clearly to the contrary. *See Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). Petitioner, of course, chose not to appeal the procedural default rulings of the district court – a choice that not only belies his current assertion that Rule 39 "reflects existing law" (Pet. Br. 35), but that also warrants a conclusion that petitioner has abused the writ. *See Dugger v. Johnson*, 485 U.S. 945 (1988) (O'Connor, J., dissenting from denial of motion to vacate stay of execution) ("the State is clearly correct to argue that the writ of habeas corpus is abused when a claim is raised in one petition, abandoned on appeal, and then raised again in a successive petition).

crucial question is whether new matters have been considered, or presented for consideration, by the court. Noting that the Ninth Circuit had been "specific in reciting that it acted on the *exclusive basis* of [the petitioner's] first federal habeas petition," and that this recitation "[was] not disproved by *consideration of matters presented in a later filing*," *id.* (emphasis added), this Court ruled that the Ninth Circuit's recall of the mandate "did not contravene the letter of AEDPA." *Id.* The Court pointed out, however, that "had the court considered claims or evidence presented in [the petitioner's] later filings, its action would have been based on a successive application, and so would be subject to § 2244(b)." *Id.*[30]

> The en banc court based its decision only on the claims and evidence presented in Thompson's first petition for federal habeas relief. Had it considered the additional evidence or claims presented in Thompson's motion to recall the mandate, of course, its decision would have been subject to § 2244(b).

[30] Petitioner has previously focused on the Court's reference here to a habeas court's consideration of "*claims or evidence*" in later filings, to the exclusion of the Court's reference to "consideration of *matters* presented in a later filing" (emphasis added), and suggested that the Court's ruling in *Calderon* was limited to post-judgment motions raising new claims or new evidence. But the Court's focus in *Calderon* was clearly on whether the Ninth Circuit's recall of the mandate was based exclusively on matters presented in the first habeas application, as opposed to a second, *i.e.*, the recall motion. The Court made no reference to new law simply because no new law was raised by Thompson's recall motion. Indeed, there is no logical justification for treating a post-judgment motion raising new claims or new evidence as a successive habeas application, but not so treating a like motion that renews the request for habeas relief by raising a new law. The latter effort is just as much the "second bite of the apple" that Congress sought to prohibit.

523 U.S. at 562. *See Burris*, 130 F.3d at 783-84, 785 (noting distinction between "readjudicat[ing] old arguments" and "determin[ing] the effect of new evidence and arguments"; "reassessing old theories in light of new evidence" is a step forbidden by § 2244(b)). Thus, where a Rule 60(b) motion relies on new law to assert or reassert claims for habeas relief, the question is only whether that law was presented as part of petitioner's original petition.

Petitioner's argument that Rule 39 is not "new" addresses a different question. He is suggesting that Rule 39 does not announce "a new rule of law," as under the *Teague*[31] retroactivity analysis or under the analysis required by 28 U.S.C. § 2244(b)(2). *See Tyler v. Cain*, 533 U.S. 656, 662 (2001). But this argument is beside the point, because it does not address, much less alter, the fact that petitioner did not present Rule 39 as part of his original petition.[32] Indeed, his effort to resurrect claims in that petition "rests upon a state procedural rule, adopted three years after the district court's judgment" (J.A. 36) (emphasis added), and thus constitutes a new habeas application.

[31] 489 U.S. 288.

[32] *See Gray-Bey*, 209 F.3d at 989 (post-judgment motion relying on new law treated as successive petition, but authorization to file same denied because the new law "did not announce a new rule of constitutional law"); *Rich*, 141 F.3d at 553 (same); *Ruiz*, 104 F.3d at 165 (same).

II. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN REFUSING TO WITHHOLD THE MANDATE, MODIFY ITS JUDGMENT, OR REMAND THE CASE TO THE DISTRICT COURT.

Petitioner contends that, regardless whether the court of appeals erred in its treatment of his Rule 60(b) motion as a second or successive habeas petition, it abused its discretion in denying his "Motion to Withhold the Mandate and Grant Rehearing En Banc or Remand for Further Proceedings." The argument is without merit for a number of reasons.

A. Petitioner's Motion In the Court of Appeals Was the Equivalent of a Request to Recall the Mandate, Which Constituted a "Second or Successive" Application Under 28 U.S.C. § 2244(b).

Following the disposition of the habeas case by the three-judge panel on September 13, 2000, the court of appeals denied rehearing and a suggestion for rehearing en banc on December 22, 2000, but stayed the issuance of the mandate pending a petition for a writ of certiorari. This Court denied certiorari on October 9, 2001. Petitioner's motion, requesting that the mandate be withheld and en banc rehearing granted or, in the alternative, that the case be remanded to the district court for further proceedings, was filed with the court of appeals the next day. A copy of this Court's order denying certiorari was filed with the clerk of the court of appeals on October 16.

Rule 41(d)(2)(D), Federal Rules of Appellate Procedure, provides that "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court

order denying the petition for a writ of certiorari is filed." Thus, upon the filing of a copy of this Court's order on October 16, the issuance of the mandate by the court of appeals was a ministerial act that it was compelled to perform under Rule 41(d)(2)(D). *See also* 16A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3987.1, p. 744 (3d ed. 1999) (If the Supreme Court denies certiorari, "the stay is automatically dissolved and the rule directs that the court of appeals 'must issue the mandate immediately' when a copy of a Supreme Court order denying the petition for a writ of certiorari is filed"). Therefore, to stay the mandate following denial of certiorari is an extraordinary act tantamount to a decision by a court of appeals to recall the mandate. *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992) (en banc); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989).

While the courts of appeals are recognized to possess an inherent power to recall their mandates, subject to review for an abuse of discretion, the power can be exercised only in "extraordinary circumstances." *Calderon*, 523 U.S. at 549-50. "The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* at 550. A court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief "unless it acts to avoid a miscarriage of justice as defined by [this Court's] habeas corpus jurisprudence." *Id.* at 558. "'[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence.'" *Id.* at 559 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). Thus, if the petitioner asserts his actual innocence of the underlying crime, "he must show 'it is more likely

than not that no reasonable juror would have convicted him in light of the new evidence. . . . '" *Id.* at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). If the petitioner challenges his death sentence, "he must show 'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Id.* at 559-60 (quoting *Sawyer*, 505 U.S. at 348).

As previously demonstrated in Argument I, a motion to recall the mandate can be regarded as a second or successive application for purposes of 28 U.S.C. § 2244(b). *Calderon*, 523 U.S. at 553; *Burris*, 130 F.3d at 784 ("a motion filed in the court of appeals after the time for rehearing has expired (or rehearing has been sought and denied) may be granted only if it meets the substantive criteria of § 2244(b)(2)"). Indeed, petitioner sought to achieve the same thing by way of his motion filed in the court of appeals as he sought by way of his Rule 60(b) motion filed in the district court: the fifth ground in petitioner's motion in the Sixth Circuit also sought review, in light of the adoption of the Tennessee Supreme Court's Rule 39, of the district court's determination that certain prosecutorial misconduct claims were procedurally defaulted. Although the procedurally defaulted claims were not part of the court of appeals' judgment,[33] petitioner's motion bore all of the hallmarks of a motion for leave to file a second or successive petition in the district court under § 2244(b)(3)(B). And, for the reasons stated in Argument I.A.1, *supra*, the district court's procedural default

[33] The court of appeals noted that "the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." (J.A. 39)

ruling was a "merits" determination. Therefore, the assertion that the district court's resolution of the prosecutorial misconduct claims was incorrect was also on the basis of the "merits." Section 2244(b)(1) is clear that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Because petitioner's motion constituted a second or successive application under § 2244(b)(1), it was required to be dismissed. It necessarily follows that the court of appeals' denial of the motion could not have been an abuse of discretion.

But even if petitioner's motion was not subject to § 2244(b), petitioner cannot demonstrate an abuse of discretion by the court of appeals in refusing to recall its mandate. The premise upon which *Calderon* rests is the State's interest in finality. This Court began its analysis in *Calderon* by stressing the extraordinary nature of the act of recalling the mandate "[i]n light of the 'profound interest in repose' attaching to the mandate of a court of appeals." *Calderon*, 523 U.S. at 549-50 (quoting 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3938, p. 712 (2d ed. 1996)). Citing several examples of the Court's imposition of significant limits on the discretion of federal courts to grant habeas relief, *Calderon*, 523 U.S. at 554-55, the Court observed that "[t]hese limits reflect our enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system,'" *id.* at 555 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)); and that "[f]inality is essential to both the retributive and the deterrent functions of criminal law," "enhances the quality of judging," and "serves as well to preserve the federal balance." *Calderon*, 523 U.S. at 555. Focusing on a

federal court of appeals' mandate, the Court recognized that

> [a] State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief. At that point, having in all likelihood borne for years "the significant costs of federal habeas review," the State is entitled to the assurance of finality. When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," an interest shared by the State and the victims of crime alike.

Id. at 556 (internal citations omitted). In cases where a court of appeals recalls its mandate to revisit the merits of its earlier decision denying habeas relief, "the State's interests in finality are all but paramount, without regard to whether the court of appeals predicates the recall on a procedural misunderstanding or some other irregularity occurring prior to its decision." *Id.* at 557. Because the prisoner has already had extensive review of his claims, absent a strong showing of actual innocence "the State's interests in actual finality outweigh the prisoner's interest in obtaining yet another opportunity for review." *Id.*

In this case, the court of appeals *declined* to recall its mandate. A decision refusing to recall a mandate fosters, rather than frustrates, the State's "all but paramount"

interest in finality. Where a court of appeals refuses to recall its mandate, there has been no abuse of discretion under *Calderon's* principles. Petitioner cannot demonstrate an abuse of discretion by the court of appeals in denying his motion.

Furthermore, even if subjected to *Calderon's* abuse of discretion test, the court of appeals' refusal to recall the mandate was not an abuse of discretion. In requesting that the mandate be withheld, petitioner relied primarily on an intervening procedural rule adopted by the Tennessee Supreme Court on the exhaustion of state remedies, allegedly demonstrating that the district court had erred in finding his prosecutorial misconduct claims procedurally defaulted. (J.A. 153) This ground was legal, not factual, and, therefore, plainly insufficient to justify a recall of the mandate under *Calderon's* "actual innocence" standard.[34] *Calderon,* 523 U.S. at 559 ("the miscarriage of justice exception is concerned with actual as compared to legal innocence") (quoting *Sawyer*, 505 U.S. at 339).

B. The Court of Appeals' Denial of the Motion Was Not Otherwise An Abuse of Discretion.

But even if petitioner's motion is viewed simply as an ordinary motion – and not a motion to recall the mandate

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[34] The motion's other four grounds, asserting error in the panel's disposition of the claim of ineffective assistance of counsel at the sentencing phase, based upon alleged conflicts between the panel decision and certain decisions of this Court, alleged conflicting decisions of the Sixth Circuit, and perceived inconsistencies in the State's arguments made in the court of appeals, were likewise legal, not factual.

and a second or successive application under § 2244(b) – the court of appeals did not abuse its discretion in denying it. Contrary to petitioner's assertions, the court of appeals was not "obliged to give effect to" Rule 39.

In the first place, petitioner clearly waived his challenge to the district court's procedural default ruling on his prosecutorial misconduct claims when he did not appeal the issue. He candidly admitted that he did not challenge the district court's procedural default determinations, "principally because he had prevailed in the district court, and also because substantial page limits constrained the number of points he could raise."[35] (J.A. 155) Under prevailing Sixth Circuit precedent, by failing to contest the district court's denial of the prosecutorial misconduct claims for procedural default, petitioner waived his right to appellate review of the claims. *See White Consol. Indus., Inc. v. Westinghouse Elec. Corp.*, 179 F.3d 403, 407-408 (6th Cir. 1999). *See also* Fed.R.App.P. 28(a) (requiring that an appellant's brief include "a statement of the issues presented for review" and an "argument" containing "appellant's contentions and the reasons for them. . . . "). Indeed, in denying the motion, the court of appeals clearly acknowledged that the issue had never been before the court, remarking that "the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." (J.A. 39)

[35] Petitioner prevailed in the district court only as to the death sentence but not the conviction for first degree murder, and the majority of his prosecutorial misconduct claims arise in connection with the guilt phase of the trial. (J.A. 155)

Because petitioner had not even challenged the district court's procedural default ruling on appeal, and because the issue was raised for the first time in petitioner's motion, the court of appeals cannot be faulted for refusing to grant extraordinary relief.[36] Petitioner's sweeping assertion that "the courts of appeals uniformly recognize that the denial of certiorari does not affect their power and duty to modify their judgments to account for intervening legal developments" (Pet. Br. 39) ignores a pertinent fact present in the decisions he cites: the issue was before the court of appeals in the first place. In fact, in all of the cases relied on by petitioner, the intervening legal developments warranting extraordinary relief bore directly on issues raised and thoroughly litigated in the case before the court of appeals.[37] Here, by contrast,

[36] *See United States v. Barela*, 571 F.2d 1108, 1115 (9th Cir. 1978) (Ferguson, J., dissenting) (viewing government's second petition for rehearing as motion to recall mandate, but noting that, since question presented was neither raised in original appeal nor on first petition to rehear, "[e]ven viewing the present proceedings as a simple petition for rehearing, we would be justified in declining to consider a question so belatedly raised").

[37] *See, e.g., Sargent v. Columbia Forest Prod., Inc.*, 75 F.3d 86, 88-90 (2d Cir. 1996) (after affirming dismissal of retaliatory discharge claim based on court of appeals' interpretation of state law, mandate recalled to revisit issue following inconsistent decision by the state's supreme court, when appellant "not only made the argument that prevailed" in state supreme court, but "brought to our attention" that case was pending there); *First Gibraltar Bank v. Morales*, 42 F.3d 895, 896-97 (5th Cir. 1995) (after accepting appellant's federal preemption argument, court of appeals vacates judgment prior to issuance of mandate when new federal legislation makes clear no preemption of state law); *Bryant*, 886 F.2d at 1527-30 (after concluding district court lacked subject matter jurisdiction, court of appeals vacates judgment prior to issuance of mandate when intervening federal legislation modifies jurisdictional requirements); *Zipfel v. Halliburton Co.*, 861

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petitioner had never preserved for review the issues he presented in his motion. Petitioner can hardly complain that the court of appeals' refusal to afford him extraordinary relief was an abuse of discretion.

In any event, application of Rule 39 would not have revived petitioner's prosecutorial misconduct claims deemed procedurally defaulted by the district court for petitioner's failure to present them to the Tennessee Supreme Court. In *Boerckel*, this Court held that a discretionary application to a state's highest court is ordinarily an "available" state remedy which must be exhausted under 28 U.S.C. § 2254(b) and (c) but that "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is *not available*." 526 U.S. at 847-48 (emphasis added). The fatal flaw in petitioner's reasoning is that Rule 39 does not make discretionary review unavailable in criminal cases.

Rule 39 provides, in pertinent part:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant *shall not be required* to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

F.2d 565, 567-68 (9th Cir. 1988) (court of appeals recalls mandate after Supreme Court decision demonstrates court applied wrong analysis to appellant's claims); *Alphin v. Henson*, 552 F.2d 1033, 1034-36 (4th Cir. 1977) (court vacates judgment prior to issuance of mandate in light of intervening change in law regarding award of attorneys' fees, where "the subject of plaintiff 's claim to attorneys' fees has been the subject of litigation throughout").

(emphasis added). This rule is simply a declaration by the Tennessee Supreme Court that, in its view, an application for permission to appeal to that court is unnecessary in order to satisfy § 2254's exhaustion requirement. But nothing in the rule makes discretionary review unavailable to criminal litigants. Indeed, an application for permission to appeal under Rule 11, Tenn.R.App.P., remains available to all litigants: "an appeal by permission may be taken from a final decision of the Court of Appeals or the Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court . . . ." Rule 11(a), Tenn.R.App.P. The Advisory Commission Comment to Rule 11, amended after the adoption of Rule 39, points out that Rule 39 "works no change to Tenn.R.App.P. 11 itself." Moreover, even if Rule 39 could be said to have rendered discretionary review under Rule 11 "unavailable" under *Boerckel* as of the date of its promulgation, it cannot be applied retrospectively. The Tennessee Supreme Court cannot alter the objective historical fact that such review was available in 1995 – the time of petitioner's state post-conviction appeal. *See Wenger v. Frank*, 266 F.3d 218, 226 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 1364 (2002). Accordingly, because Rule 39 could not resurrect petitioner's procedurally defaulted prosecutorial misconduct claims, they would have been

dead on arrival in the district court in the event of a remand from the court of appeals.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee

MICHAEL E. MOORE
Solicitor General

GORDON W. SMITH
Associate Solicitor General

JOSEPH F. WHALEN
Assistant Attorney General
Counsel of Record
425 Fifth Avenue North
Nashville, Tennessee 37202
(615) 532-7357